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Supreme Court, U.S.
FILED

No. ____ (1)

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In The

Supreme Court of the United States

HAKAN OZCELIK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Petitioner's conviction for bribe receiving by a public official was sustained on an aiding and abetting theory, but there was no evidence other than Petitioner's uncorroborated say-so that any crime was ever committed by any putative principal, whether 18 U.S.C. § 2 and the Due Process Clause permit conviction?

2. Where Petitioner told a confidential informant that immigration officials had agreed to alter the informant's visa in return for payment to be given to Petitioner, but there was no evidence that any such immigration officials even existed or that the electronic immigration file for the informant had ever been accessed, whether 18 U.S.C. § 2 and the Due Process permit conviction on a theory of aiding and abetting a principal to commit a federal crime?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the court whose judgment is sought to be reviewed were as in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 527 F.3d 88, and is reprinted in the appendix at App. 1. The relevant opinion of the district court, which is unreported, is reprinted in the appendix at App. 29.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2008, and amended by Order dated June 19, 2008. By Order dated June 23, 2008, the court denied Petitioner's petition for panel rehearing. This petition for a writ of certiorari is filed within ninety days of that Order in compliance with Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

Title 18 United States Code, Section 2, provides:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 United States Code, Section 201, provides in pertinent part:

> (b) Whoever –
>
> * * *
>
> (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally, or for another person or entity, in return for: A) being influenced in the performance of any official act; [or] C) being induced to do or omit to do any act in

violation of the official duty of such official or person [shall be punished].

STATEMENT OF THE CASE

1. Petitioner was tried before a jury in March, 2006, in the United States District Court for the District of New Jersey (Hochberg, U.S.D.J.), on one count of seeking and accepting a corrupt payment, in violation of 18 U.S.C. §§ 201(b)(2) and 2, and one count of attempting to shield an illegal alien from detection in violation of 18 U.S.C. § 1324(a)(1)(A)(iii).

According to the prosecution, Petitioner, a naturalized Turkish immigrant working as an officer of the United States Customs and Border Protection Agency, told Tunc Tuncer, an illegal alien from Turkey with a lapsed student visa, that if Tuncer provided him with $2,300, Petitioner would pass that money on to two friends who worked at the Immigration and Naturalization Service ("INS") and could change Tuncer's visa dates on the INS computer. Petitioner did not ask for any money for himself. Over the course of several weeks and several meetings, during which Petitioner assured Tuncer that his two friends would deliver an extension of his visa, the student – who was cooperating with the federal government – delivered $2,300 in cash to Petitioner.

2. At trial, the prosecution did not present any evidence that the investigation of the Petitioner unearthed any effort on the part of the Petitioner or

anyone else to access the student's visa information on the INS computer or take any other action to alter the student's immigration status, or even that the two friends referred to by Petitioner in fact existed. The defense at trial was that the prosecution had failed to prove the required statutory element that any official action had actually occurred. Nevertheless, the jury found Petitioner guilty of both counts.

3. By Order dated September 7, 2006, the district court denied Petitioner's motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. (App. 29-38)

4. Petitioner's conviction was affirmed by the court of appeals in a published opinion. The court did not adopt the conclusions of the district court, but instead engaged in its own analysis of whether the evidence was legally sufficient that the principals (in this case the unidentified "friends" at INS) agreed to take a bribe in exchange for promising to alter Tuncer's visa. Although the court recognized that "it is not necessary [for the principal] to actually perform the prohibited act," the court's analysis focused on the more basic question of whether such INS officials even existed. As the court and the government acknowledged, the sole evidence of their existence was "Ozcelik's own statements to Tuncer that he had a friend within the INS who would undertake to alter Tuncer's visa status." (App. 11)

The court of appeals concluded that:

> Although there is no evidence that the friend actually adjusted the visa status, there is evidence from which the jury could infer that the friend agreed to adjust the visa, and it was at that point that the crime of the principal was complete. Because there was sufficient evidence from which the jury could rationally conclude that Ozcelik had induced a friend at the INS to alter Tuncer's status in exchange for a bribe, there was sufficient evidence to support Ozcelik's guilt on a theory of aiding and abetting.
>
> * * *
>
> *We agree that it is possible that there was no "friend" at the INS* and that Ozcelik was lying to Tuncer by telling him that his friend at the INS would adjust Tuncer's status, when, in reality, Ozcelik intended to keep the money without taking any action to adjust Tuncer's status. Indeed, *the only evidence the government produced at trial that the unnamed friend existed was Ozcelik's own statements to that effect.* But we are not permitted to assess credibility. And as such, we cannot say as a matter of law that no reasonable juror could accept the government's theory premised on Ozcelik's own statements.
>
> * * *
>
> Although we are concerned that the government could not, through its investigation, discover the identity of Ozcelik's acquaintance at INS, that concern does not warrant

> overturning Ozcelik's conviction. After all, Ozcelik's own words provide the missing link and he did accept the money Tuncer paid for the performance of the official act.

(App. 14-15; emphasis added.)

5. The court reversed Petitioner's conviction, however, with respect to shielding from detention an illegal alien, concluding that the evidence was legally insufficient to show that Petitioner's conduct tended to substantially facilitate Tuncer's remaining in the United States illegally. (App. 28)

The matter was remanded by the court of appeals for resentencing, and on July 21, 2008, Petitioner was resentenced to a term of 23 months, which the district court acknowledged amounted to time served, and a term of two years supervised release, which Petitioner is currently serving.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Holding Sustaining Petitioner's Conviction for Bribe Receiving by A Public Official on An Aiding And Abetting Theory, When There Was No Evidence Other Than Petitioner's Uncorroborated Say-So That Any Crime Was Ever Committed by Any Putative Principal, Violated The Requirement under The Due Process Clause And 18 U.S.C. § 2 That There Be Proof beyond A Reasonable Doubt That A Federal Crime Occurred.

1. Although it is commonplace for defendants to be charged with violating 18 U.S.C. § 2, the aiding and abetting statute, this Court has not had many opportunities to address the statute or the way in which it has been applied. In *Standefer v. United States*, 447 U.S. 10 (1980), the Court's most recent case of note discussing aiding and abetting, it addressed the question of whether a defendant could be convicted when the principal he was charged with aiding and abetting had previously been acquitted at a separate trial. The Court answered that it was irrelevant whether the principal was acquitted. *Id.* at 20. The Court has not, however, had the opportunity to address the more troublesome question of whether a conviction premised on aiding and abetting can stand when there was no evidence – aside from the defendant's own statements – that any principal had committed a crime, or even existed.

Here, as the court of appeals acknowledged below, "it is possible that that there was no 'friend' at the INS, . . . [and i]ndeed, the only evidence the government produced at trial that the unnamed friend existed was Ozcelik's own statements to that effect" (App. 15), and thus the central element of the charged offense – that a crime was committed by another which was aided and abetted by the defendant – was proven purely by uncorroborated admissions of the defendant. For the same reasons that a defendant's uncorroborated statements are not legally sufficient to satisfy the similar requirement that there be proof that a crime charged against a defendant actually occurred, *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (in discussing requirement of corpus delicti, noting that "a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused"), they are even less so when a defendant's statements implicating another in a crime are the only evidence that the crime occurred.

The Court should grant certiorari to make it clear that for a defendant to be convicted on a theory of aiding and abetting, there must be independent evidence beyond a defendant's own statement to prove the element that a crime was in fact committed by another individual. *In re Winship*, 397 U.S. 358 (1970) (fundamental requirement of due process that each element of a criminal offense must be proven at trial beyond a reasonable doubt).

2. The statute governing aiding and abetting provides: "Whoever commits an offense against the United States or aids, abets, counsels, commends, induces or procures its commissions, is punishable as a principal." 18 U.S.C. § 2(a). Although the court of appeals did not expressly outline the elements required to be proven for a defendant to be convicted under an aiding and abetting theory, it relied upon *United States v. Dixon*, 658 F.2d 181 (3d Cir. 1981), which stated the following:

> In order to convict a defendant of aiding and abetting the commission of a crime, the Government must prove two essential elements: (1) *that the substantive crime has been committed*; and (2) that the defendant charged with aiding and abetting that crime knew of the commission of the substantive offense and acted with the intent to facilitate it.

Id. at 189 (emphasis added).

The court of appeals cited several cases for the proposition that there must be proof that someone committed a crime, but none of those cases stood for the proposition that evidence of the type at issue here sufficed to show the commission of a crime. *United States v. Cades*, 495 F.2d 1166, 1167 (3d Cir. 1974) (conviction reversed where no direct evidence of defendant's intent to aid and abet principal's criminal activity); *United States v. Nolan*, 718 F.2d 589, 590 (3d Cir. 1983) (person being aided and abetted testified at trial directly about involvement in underlying

offense); *United States v. Dixon*, 658 F.2d at 191 (same).

The court of appeals did not mention *Standefer v. United States*, although that is not entirely surprising, since the alleged principal in *Standefer* was identified and charged. Thus, there was no apparent question at Standefer's trial as to whether the evidence that the principal had committed the crime, notwithstanding his acquittal, was legally sufficient, and no need for the Court to discuss whether uncorroborated statements by the defendant alone could suffice as evidence that a crime had been committed by another and that the defendant had aided and abetted the commission of that crime. *See United States v. Mann*, 811 F.2d 495, 497 (9th Cir. 1987) (*citing Standefer* as example of case in which "it is clear that although the principal was not convicted, the underlying offense was committed").

In other cases, proof that someone actually committed the underlying offense is far less clear. Although a number of lower courts have concluded that a defendant can be convicted of aiding and abetting even when the principal was not identified, *see United States v. Provenzano*, 334 F.3d 778, 691 (3d Cir. 1964) (*citing Gray v. United States*, 260 F.2d 483 (D.C. Cir. 1958)); *United States v. Mann*, 811 F.2d at 497 (*citing Provenzano*), those cases do not address the question at issue here, since they take as a given that the evidence was sufficient to demonstrate that a crime was, in fact, *committed* by someone. Indeed, in *Gray v. United States*, although cited for the notion

that the principal need not be identified, the issue related to an alleged principal who was indicted but ultimately had the charges dismissed, 260 F.2d at 484, not an altogether unidentified principal.

3. In any event, there is a sizable difference between a scenario in which it is plain that an offense was committed, although the identity of the offender remains unknown or uncertain, and a scenario such as here, in which there is no evidence that the principal even exists or that the principal committed a crime, other than the defendant's say-so. It is evident here that the court of appeals relied exclusively on Petitioner's admissions to conclude that the evidence was legally sufficient: "the only evidence the government produced at trial that the unnamed friend existed was Ozcelik's own statements to that effect. But we are not permitted to assess credibility." (App. 14-15) The court of appeals reasoned from this that "[b]ecause there was sufficient evidence from which the jury could rationally conclude that Ozcelik had induced a friend at the INS to alter Tuncer's status in exchange for a bribe, there was sufficient evidence to support Ozcelik's guilt on a theory of aiding and abetting."[1] (App. 14-15)

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[1] While the court of appeals emphasized that it was not necessary for the prosecution to have proven that the unidentified friends "actually adjusted the visa status," since the "crime of the principal was complete" at the time the friend agreed to adjust the visa (App. 14-15), such analysis reduces the

(Continued on following page)

But in relying on its familiar "obligation to view the evidence in the light most favorable to the government and [to] sustain a jury's verdict if a reasonable jury believing the government's evidence could find beyond a reasonable doubt that the government proved all of the evidence of the offense," (App. 11-12, citations and internal quotations omitted), the court of appeals conflated its inquiry into the sufficiency of the evidence with the jury's credibility determination. (App. 12, 14) ("we must defer to the jury's assessment of witness credibility" and "[i]f the jury believed that evidence [of Petitioner's statements], it could reasonably have concluded that Ozcelik had a contact (or contacts) at INS whom he aided in taking a bribe to violate the contact's official duty"). The court of appeals' reduction of its analysis to simply accepting the jury's credibility finding ultimately came at the expense of exploring whether an otherwise uncorroborated admission of a defendant is itself competent to show that a crime was committed by another.

4. In *Wong Sun v. United States*, the Court specified that, in cases where there was no physical proof to establish that a crime had, in fact, occurred, additional uncorroborated statements of the defendant were not adequate corroboration to establish the corpus delicti requirement. 371 U.S. at 491, *citing United States v. Calderon*, 348 U.S. 160, 165 (1954).

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requirement that there be evidence of an actual crime or an actual agreement to near meaninglessness.

While it is true that in *Opper v. United States*, 348 U.S. 84 (1954), the Court determined that the corroborating evidence need not be independently sufficient to prove the corpus delicti requirement beyond a reasonable doubt, there must nevertheless be *some* evidence independent of the admission to corroborate it. *Id.* at 92-93.

The Court in *Wong Sun* cited *Opper* in explaining the inherently unreliable nature of uncorroborated out-of-court statements to prove the corpus delicti requirement:

> Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination.

371 U.S. at 489.

While the situation in *Wong Sun* admittedly differs to a degree from this case because it related to a statement by a defendant regarding a crime he himself had allegedly committed – whereas the statement here related to an offense supposedly committed by others – the circumstances here warrant even greater vigilance. It would be difficult to imagine that an uncorroborated statement by an individual claiming to have aided and abetted a principal could be admissible – let alone legally sufficient to establish proof beyond a reasonable doubt – as evidence that the *principal* committed an offense.

In analogous circumstances, statements sought to be admitted as declarations in furtherance of a conspiracy cannot by themselves serve to establish the alleged conspiracy. Fed. R. Evid. 801(d)(2)(E); *see Giles v. California*, 128 S.Ct 2678, 2691, n.6 (2008) (court must determine whether conspiracy existed before allowing purported co-conspirator statement into evidence). Under the circumstances here, the statements of the Petitioner would not have been sufficient to prove a criminal agreement involving Ozcelik and another, would not have been sufficient to prove that Ozcelik was speaking as the agent of an otherwise non-existent individual, and thus, could not serve to prove the commission of any crime by such individual.

5. This Petition involves an undeniably disturbing scenario in which the court of appeals acknowledged not merely a "very close" sufficiency of the evidence question, (App. 8), but the real possibility that the Petitioner was convicted of aiding and abetting a crime that was never committed. The court of appeals' reliance on uncorroborated admissions to make up for the otherwise complete lack of evidence that the principal even existed extends the concept of aiding and abetting far beyond the intention of the statute or the previous holdings of this Court. The Court should make it clear that such evidence alone is not legally sufficient to prove the essential element that a crime was committed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, NY
September 18, 2008

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4245

UNITED STATES OF AMERICA

v.

HAKAN OZCELIK
a/k/a Hakan Askin

Hakan Ozcelik,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 05-cr00722-1)
District Judge: Honorable Faith S. Hochberg

Argued February 12, 2008

Before: SLOVITER, SMITH,
and STAPLETON, *Circuit Judges*

(Filed: May 27, 2008)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

This appeal raises, inter alia, an issue of first impression in this court, that is, what conduct constitutes shielding, harboring, and concealing an alien within the meaning of 8 U.S.C. § 1324.

I.

Facts and Procedural History

In 1990, appellant Hakan Ozcelik, then age sixteen, came to the United States from Turkey as a stowaway on a merchant ship.[1] Thereafter, Ozcelik

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[1] Ozcelik went by the name of Askin at one time, but changed his name for family reasons.

earned his GED and a college degree in criminal justice, and worked at various jobs. He obtained legal American citizenship and on December 15, 2003, he began working as a Customs and Border Protection Officer in the Department of Homeland Security ("DHS"). He worked principally in Port Elizabeth, New Jersey inspecting cargo on cruise vessels, but also occasionally worked at Newark Airport inspecting individual passengers.

Tunc Tuncer, the government's principal witness, is a Turkish citizen who came to the United States on an F-1 student visa to participate in a master's degree program at Columbia University. When Tuncer failed to meet required academic standards, Columbia refused him readmission, thereby subjecting him to deportation for being "out of status." App. at 352.

Shortly thereafter, Tuncer discussed his immigration issue with his friend, Uzgar Madik, who was the President of the Intercollegiate Turkish Students Society. Madik phoned Ozcelik, who Madik said might be able to help, and put Tuncer on the phone. The two had a short conversation. Tuncer called Ozcelik the next day to provide the information Ozcelik had requested and Ozcelik said he would see what he could do. Ozcelik called Tuncer back the following day, stating that Tuncer's case was "doable" or "easy" and that all Tuncer had to do was pay Ozcelik $2,300. App. at 220. Ozcelik told Tuncer the money had nothing to do with him, but that it was for

two of his friends in the Immigration and Naturalization Service ("INS")[2] who were going to change some dates in the system for Tuncer's visa. Tuncer testified that Ozcelik told him he had "done this for another girl in the past recently" and would be happy to help Tuncer with his problem. App. at 225. Tuncer stated that he did not have the money and would call Ozcelik when he obtained it. Within the next week or two, Ozcelik called Tuncer several times asking about the money, but Tuncer said he did not have it and did not know when he could get it.

On March 14, 2005, Glenn Bartley, an Immigration and Customs Enforcement ("ICE") agent, visited Tuncer and told him he was "out of status." At a second meeting the next day Bartley administratively arrested Tuncer but did not detain him. At that meeting, the two discussed the possibility of Bartley receiving information from Tuncer about Ozcelik.

From March 18, 2005 until May 24, 2005, Tuncer initiated several phone conversations at the direction of law enforcement who recorded the conversations. Tuncer told Ozcelik that his immigration problem was "still continuing." App. at 970. Ozcelik reiterated that Tuncer would have to pay at least $2,000. In a subsequent recorded conversation, Tuncer asked

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[2] As of March 2003, INS became United States Citizenship and Immigration Services, an agency within the Department of Homeland Security. We use the term "INS" or "Immigration" throughout because that is the term used in the record.

Ozcelik if $2,000 would be enough. Ozcelik responded: "No it can't. There is 2000 and than [sic] there is 300 for the fee, they will give those, they will do the thing for you, they will do the thing from the inside." App. at 979. Ozcelik never told Tuncer the names of the two friends, but he continually stated that the money was for them.

Ozcelik and Tuncer arranged a meeting at the New Port Mall on March 24, 2005, so that Tuncer could pay Ozcelik the $2,300 fee and provide him with a copy of his immigration paperwork. At that meeting, Ozcelik took the money and told Tuncer that it would take at least three months for anything to happen. Following the meeting, Tuncer and Ozcelik had one more recorded phone conversation in which Tuncer asked whether there was "anything new" and Ozcelik said that he had made the necessary contacts and that Tuncer would be the one "receiving news." App. at 999.

As a result of those conversations and the controlled meeting between Tuncer and Ozcelik, a federal grand jury charged Ozcelik in a two-count indictment. Count One of the indictment charged Ozcelik with seeking and accepting a bribe in return for being influenced in the performance of official acts and being induced to do or omit acts in violation of official duties, in violation of 18 U.S.C. § 201(b)(2). Count Two charged Ozcelik with attempting to conceal, harbor, and shield from detection an illegal alien, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii).

The jury trial began on March 14, 2006. When the government rested, Ozcelik reserved his right to move for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Ozcelik thereafter presented evidence, including testifying on his own behalf. The jury convicted Ozcelik on both counts. The District Court denied Ozcelik's renewed motion for judgment of acquittal.

With regard to the bribery conviction, the District Court held that there was ample evidence that Ozcelik solicited and accepted $2,300 from Tuncer. The Court also stated that there was substantial evidence that Ozcelik contemplated passing on some or all of the $2,300 to other immigration officials for the purpose of their taking official action to assist Tuncer. The Court further held that a reasonable juror could infer corrupt intent in soliciting the bribe because there was substantial evidence of Ozcelik's consciousness of wrongdoing. With respect to the conviction for shielding/harboring an alien, the Court held that there was sufficient evidence that Ozcelik gave Tuncer multiple instructions to conceal his activities in order to avoid detection by immigration authorities. The Court characterized Ozcelik's conduct as "instructing Tuncer to hide from the immigration authorities," App. at 14, thereby constituting the crime of shielding.

Following a sentencing hearing, the District Court sentenced Ozcelik. On the bribery conviction, the Court imposed a two-level enhancement for obstruction of justice for Ozcelik's false trial testimony,

resulting in an adjusted offense level of 16. With respect to the shielding conviction, the Court imposed a two-level enhancement because Ozcelik abused a position of trust, resulting in an adjusted offense level of 11. The District Court denied Ozcelik's request to group the two offenses pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") § 3D1.2. Instead, the Court followed the recommendation of the Probation Officer, who had calculated the offense level by applying the multiple-count adjustment pursuant to U.S.S.G. § 3D1.4, resulting in a total offense level of 17. With an offense level of 17 and a criminal history category of I, Ozcelik's Guidelines range was twenty-four to thirty months imprisonment. The Court sentenced Ozcelik to twenty-seven months imprisonment on each count, to be served concurrently.

Ozcelik appeals.[3] He argues that the evidence was insufficient to sustain both the bribery and shielding convictions. He also argues that the Court erred in defining the term "official act" in its instructions to the jury. Finally, Ozcelik contends that the Court erred by not grouping his offenses at sentencing.

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[3] We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II.

Sufficiency of Evidence on Count One – Bribery

It is black letter law that in order to convict a defendant the government must prove each element of a charged offense beyond a reasonable doubt. *See In re Winship,* 397 U.S. 358, 364 (1970). We apply a deferential standard in determining whether a jury's verdict rests on sufficient evidence. Viewing the evidence in the light most favorable to the government, we will sustain a defendant's conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Voigt,* 89 F.3d 1050, 1080 (3d Cir. 1996) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). An appellant raising a claim of insufficiency of the evidence bears a "very heavy burden." *United States v. Dent,* 149 F.3d 180, 187 (3d Cir. 1998) (internal quotations omitted).

Although we believe that the issue of the sufficiency of evidence to prove bribery is a very close one, we cannot disregard that a jury convicted Ozcelik of bribery in violation of 18 U.S.C. § 201(b)(2). That statute provides that whoever:

> being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

> (A) being influenced in the performance of any official act;
>
> (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (C) being induced to do or omit to do any act in violation of the official duty of such official or person; . . .
>
> shall be fined under this title . . . or imprisoned for not more than fifteen years, or both. . . .

18 U.S.C. § 201(b)(2). The government must prove that the public official took or sought the funds for one of the three purposes enumerated in subsections (A), (B), and (C) in the statute.

Under § 201(b)(2), there are three essential elements that must be met: (1) defendant must be a public official, (2) who directly or indirectly demanded, sought, received, accepted, or agreed to receive or accept anything of value personally or for any other person or entity, and (3) did so specifically for one of the three corrupt purposes set forth in subsections (A) through (C). *See United States v. Orenuga*, 430 F.3d 1158, 1166 (D.C. Cir. 2005). There is no question that Ozcelik met the first two elements: he is a public official and he received money

from Tuncer.[4] The third element goes to Ozcelik's intent.

Thus the only disputed issue is whether the evidence is sufficient to prove that Ozcelik received Tuncer's money with a corrupt intent, that is, he did so for one of the three reasons prohibited by statute. The government argues that Ozcelik violated the statute under both subsection (A) and subsection (C), i.e., that he sought the bribe to be influenced in the performance of an official act and that he took the bribe contrary to his official duty to uphold the immigration law. It argues that Ozcelik's consciousness of wrongdoing is reflected by his consistent statements to Tuncer to conceal their arrangement.

Section 201(a)(3) defines "official act" as "any decision or action on any question, matter, cause,

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[4] Ozcelik testified at trial that he never received the money from Tuncer. However, Tuncer testified that he had given Ozcelik $2,300 at their meeting at the New Port Mall. ICE agents gave Tuncer the $2,300 in cash that he took to the meeting with Ozcelik. Although the agents could not see the money change hands from their surveillance positions, the agents patted down Tuncer when he returned to their vehicle following the exchange and verified that neither the cash nor the immigration documents he had taken to give to Ozcelik were on his person. In addition, the conversation during the exchange between Tuncer and Ozcelik was recorded. During that conversation Tuncer asked Ozcelik if he would "like to count" the money. App. at 995. Ozcelik responded, "No, no, no. . . . I believe you. . . . " App. at 995. Any reasonable juror could have found that the second element had been met based upon the ample evidence adduced at trial.

suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

The government argues that Ozcelik was guilty under this statutory section "in two non-mutually exclusive ways." Appellee's Br. at 28. First, he had the corrupt intent to take official action directly by acting "in his capacity as a DHS employee [to agree] to take official action to request others in DHS for official aid for Tuncer," and, if need be, to intervene. Appellee's Br. at 28. "Second, Ozcelik, as a middleman, agreed to importune other Immigration officials to take official action to assist Tuncer." Appellee's Br. at 28. Both theories require us to consider what is the "official action" Ozcelik took to fall within the bribery statute.

On this record, the jury could find that Ozcelik asked other individuals within DHS to take official action on behalf of Tuncer; thus both theories blend together into one theory of aiding and abetting other unidentified Immigration officials to take official action to alter Tuncer's records. As the government stated at oral argument, there is only one piece of evidence to show that such Immigration officials even existed – Ozcelik's own statements to Tuncer that he had a friend within the INS who would undertake to alter Tuncer's visa status.

We view the issue before us in light of our obligation to "view the evidence in the light most favorable

to the government and [to] sustain a jury's verdict if 'a reasonable jury believing the government's evidence could find beyond a reasonable doubt that the government proved all the elements of the offense[ ].'" *United States v. Rosario,* 118 F.3d 160, 163 (3d Cir. 1997) (quoting *United States v. Salmon,* 944 F.2d 1106, 1113 (3d Cir. 1991)). We must "defer to the jury's assessment of witness credibility" and recognize that "the government's proof need not exclude every possible hypothesis of innocence." *United States v. Bala,* 236 F.3d 87, 93-94 (2d Cir. 2000) (internal quotations and alterations omitted).

One who aids and abets another is as guilty of the underlying offense as the principal. *United States v. Dixon,* 658 F.2d 181, 191 (3d Cir. 1981) (holding that middleman who facilitated bribery of government official was liable as aider and abettor). To prove that Ozcelik aided and betted another, the government must prove that the other, i.e., the principal (in this case the unnamed friend at INS), committed all of the elements of the offense. *United States v. Cades,* 495 F.2d 1166, 1167 (3d Cir. 1974); *see also United States v. Nolan,* 718 F.2d 589, 592 (3d Cir. 1983). Notably, the offense is committed when the official (here, the unnamed INS official) agrees to accept the bribe in exchange for promising to carry out one of the statutory prohibitions (i.e., the promise to alter Tuncer's visa); it is not necessary to actually perform the prohibited act. *See Orenuga,* 430 F.3d at 1166 (stating that "'acceptance of the bribe is the violation of the statute, not performance of the illegal

promise'") (quoting *United States v. Brewster*, 408 U.S. 501, 526 (1972)).

The evidence at trial was as follows: Tuncer testified that Ozcelik told him that he would get other authorities at Immigration to change Tuncer's visa status so that he could remain in the country. During the March 23 recorded telephone conversation, Oczelik said that "they will give those, they will do the thing for you, they will do the thing from the inside." App. at 979.[5] At the March 24 meeting, Ozcelik stated, "the only thing I know is that the person I know will do something for you from the INS." App. at 986. Later in the same conversation, Ozcelik said, "At least 3 months, 3 months will have to go by, because these kind of things have a certain way, it will be in the system, there are a lot of people in front of you in the system. He needs to do something within that system, do you understand what I mean?" App. at 987. In a later recorded telephone conversation on May 24, Tuncer asked for assurance that Ozcelik had spoken with his friend at the INS and that the friend had undertaken to help. Ozcelik was reluctant to talk about such matters by phone but did confirm that he had "contacted the people in question" for Tuncer and that Tuncer "should be the one receiving news." App. at 999.

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[5] The government and Ozcelik each submitted slightly different versions of the recorded transcripts. There is no substantive difference between the two.

In addition, Tuncer testified at trial that in one of the earlier, unrecorded telephone conversations, Ozcelik had told him that his case was "doable," i.e., "easy for him." App. at 220. Tuncer testified that Ozcelik had asked him for $2,300, and Tuncer asked what the money was for. Ozcelik replied that the money "was for two of his friends who worked . . . at INS and they were going to change some dates within the system for [Tuncer's] visa." App. at 221.

If the jury believed that evidence, it could reasonably have concluded that Ozcelik had a contact (or contacts) at INS whom he aided in taking a bribe to violate the contact's official duty. The evidence that the friend had undertaken to adjust Tuncer's visa status was Ozcelik's own statements to Tuncer that his friend was going to adjust the visa within the system for Tuncer. Although there is no evidence that the friend actually adjusted the visa status, there is evidence from which the jury could infer that the friend agreed to adjust the visa, and it was at that point that the crime of the principal was complete. Because there was sufficient evidence from which the jury could rationally conclude that Ozcelik had induced a friend at INS to alter Tuncer's status in exchange for a bribe, there was sufficient evidence to support Ozcelik's guilt on a theory of aiding and abetting.

Ozcelik argues that there is insufficient evidence because the government could not name a specific official whom Ozcelik aided and abetted and there is no evidence that such unnamed official actually

adjusted the visa. Ozcelik raises an intriguing argument. We agree that it is possible that there was no "friend" at the INS and that Ozcelik was lying to Tuncer by telling him that his friend at the INS would adjust Tuncer's status, when, in reality, Ozcelik intended to keep the money without taking any action to adjust Tuncer's status. Indeed, the only evidence the government produced at trial that the unnamed friend at INS existed was Ozcelik's own statements to that effect. But we are not permitted to assess credibility. And as such, we cannot say as a matter of law that no reasonable juror could accept the government's theory premised upon Ozcelik's own statements.

Although we are concerned that the government could not, through its investigation, discover the identity of Ozcelik's acquaintance at INS, that concern does not warrant overturning Ozcelik's conviction. After all, Ozcelik's own words provide the missing link and he did accept the money Tuncer paid for the performance of the official act.

Ozcelik proffered an alternative view of the evidence, i.e., that he solicited the money to procure a lawyer named Sol Kodsi to assist Tuncer. Kodsi testified that Ozcelik had requested that he represent Tuncer and that he had told Ozcelik that Tuncer's case would probably cost $2000 plus $300 for the filing fee and mailings. Kodsi testified that if Tuncer brought him $2,300 he would "probably more than likely take his case." App. at 588. Kodsi also testified

that he had made an appointment with Tuncer through Ozcelik for March 25, 2005.

The jury was free to reject Kodsi's testimony, particularly in light of the absence of any evidence that Kodsi ever spoke to Tuncer or that Ozcelik ever communicated any information about Kodsi to Tuncer. Instead, Ozcelik's statements to Tuncer were always in terms of his INS contacts. For example, he stated that "they will do the thing for you, *they will do the thing from the inside.*" App. at 979 (emphasis added). Moreover, although Kodsi testified he was a longtime friend of Ozcelik, Ozcelik had stated in one recorded conversation that he was "not very close" to the ones who would be helping Tuncer, App. at 991, thereby throwing into question the alleged discussion with Kodsi. Although Ozcelik may have given a viable explanation for the request for funds, we cannot say that it was unreasonable for the jury to reject it in favor of the government's theory.

Ozcelik argues that the District Court improperly charged the jury on the meaning of "official act" as used in § 201(b)(2). Because Ozcelik did not object to the jury instructions at trial, we review for plain error. *United States v. Wolfe,* 245 F.3d 257, 260-61 (3d Cir. 2001). A "plain error" is one that affects substantial rights. *Id.* (citing *United States v. Olano,* 507 U.S. 725, 732 (1993)). An error affects "'substantial rights' if it was prejudicial in that it affected the outcome of the District Court proceedings." *Id.* at 261 (citing *Olano,* 507 U.S. at 733). It is the defendant's burden to establish that the error prejudiced the

jury's verdict. *Id.* Still, "[e]ven if the defendant establishes the existence of plain error, Rule 52(b) leaves to the sound discretion of the Court of Appeals the decision whether to correct the error. While the Court of Appeals has the authority to order correction when these elements are met, it is not required to do so." *Id.*

The District Court charged the jury on the definition of "official act" as follows:

> An official act means any decision or act or any question or matter which at any time may be pending or which may by law be brought before any public official *in his or her capacity* or in his or her place of trust. The term quote, "official act," includes the decisions or actions generally expected of a public official. These decisions or actions do not need to be specifically described in any law, rule or job description to be considered an quote, "official act," end quote. Official acts that violate an official duty also are not limited to those within the official's specific authority.

App. at 1149 (emphasis added).

The relevant statute defines "official act" as:

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, *in such official's official capacity,* or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3) (emphasis added). The error, Ozcelik claims, is that the District Court improperly substituted the words "in his or her capacity" for the statutory language, "in such official's official capacity." He argues that the substitution eliminated the requirement that he needed to take action in his official capacity and instead implied that he only had to take action in some unspecified capacity.

The government contends that the omission of the word "official" was the stenographer's error, and that at trial the Court read the instruction containing the word "official." Indeed, the government filed a motion to correct the record in the District Court, arguing that in fact, the Court had used the word "official" before capacity when it charged the jury. The Court concluded, based upon the testimony of the court stenographer, that there was a reasonable probability that there had been a mistake in the transcript. In addition, the written copy of the instructions the Court gave the jurors contained the word "official" and the Court had no recollection of omitting the word "official."

We defer to the District Court's conclusion that it did read to the jury the word "official." Moreover, the jurors had copies of the instructions that contained the word "official." Ozcelik has not met his burden of

showing that the alleged error substantially affected the outcome of the proceedings.[6]

III.

Sufficiency of Evidence on Count Two – Shielding/Harboring/Concealing

In his motion for judgment of acquittal, Ozcelik argued that the government failed to prove that he attempted to conceal, harbor, or shield from detection an illegal alien. The District Court denied that motion, concluding that Ozcelik had taken substantial steps to conceal Tuncer because he told him to "stay low key for 5-6 months" and not to "go left and right a lot." App. at 14. Ozcelik raises the same issue on appeal, arguing that his conduct, i.e., telling Tuncer to keep a low profile and not draw attention to himself, and stating that it was good that he lived at a different address than that on file with the INS, does not constitute harboring, concealing, or shielding under 8 U.S.C. § 1324. The government responds that Ozcelik's general advice to Tuncer substantially facilitated Tuncer's remaining in the United States illegally, and therefore constitutes shielding, harboring, and concealing under § 1324.

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[6] We decline to review Ozcelik's two additional jury instruction claims. Because Ozcelik made a joint request in favor of the very instructions he now challenges, he waived his right to raise these instructional issues on appeal under the invited error doctrine. *United States v. West Indies Transport, Inc.*, 127 F.3d 299, 311 (3d Cir. 1997).

The question of what conduct constitutes shielding, harboring, and concealing within the meaning of § 1324 is an issue of first impression in this court. The statute, 8 U.S.C. § 1324(a)(1)(A)(iii), provides, in relevant part:

> Any person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation . . . shall be punished. . . .

Tuncer was an illegal alien in the United States. He testified at Ozcelik's trial that he had remained in the United States in violation of the terms of his student visa. In addition, Ozcelik did not contest that he knew that Tuncer was an illegal alien. Indeed, at Ozcelik's trial Tuncer testified that he had told Ozcelik that he remained in the United States in violation of the terms of his student visa. Thus, the only issue on appeal is whether Ozcelik's conduct towards Tuncer constituted concealing, harboring, shielding, or attempting to conceal, harbor, or shield. It is an issue that has occupied the attention of several appellate courts.

The original 1907 version of the statute prohibited only the smuggling or unlawful bringing of aliens into the United States. *See United States v. Lopez*, 521 F.2d 437, 439 (2d Cir. 1975). In 1917, the statute

was amended to add concealing or harboring as a crime, but no punishment attached to concealing or harboring, only to smuggling. *Id.* In *United States v. Evans,* 333 U.S. 483, 484, 488 (1948), the Supreme Court discussed the legislative history of a prior version of § 1324, then 8 U.S.C. § 144. The Court stated that "the section as originally enacted was limited to acts of smuggling. And there is some evidence in the legislative history that the addition of concealing or harboring was meant to be limited to those acts only when closely connected with bringing in or landing, so as to make a chain of offenses consisting of successive stages in the smuggling process." *Id.* at 488. But, the Court noted, the evidence was not conclusive regarding Congress' intent as to the construction of the then-current version of the statute; it could be construed to criminalize as a separate offense, distinct from smuggling, the act of harboring or concealing an alien remaining in the country illegally. *Id.* The 1917 version of the statute was at issue in *Evans.* Significantly, Congress amended the statute after the decision in *Evans.* The congressional debates focused on the necessity of a statutory prohibition for those who "wilfully and knowingly" conceal or harbor an illegal alien, such as those who provide shelter for aliens. *Lopez,* 521 F.2d at 440.

Congress amended the statute in 1952 by means of Public Law 283, which applied a penalty to shielding/harboring as well as to the act of smuggling. The relevant provisions of the 1952 statute provided: "Any person . . . who . . . willfully or knowingly conceals,

harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means or [sic] transportation . . . shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs. . . ." Act of Mar. 20, 1952, Pub. L. No. 82-283, 66 Stat. 26 (1952) (current version at 8 U.S.C. § 1324(a)(1)(A)(iii)). The legislative history suggested that Congress intended to strengthen the law in "preventing aliens from entering *or remaining* in the United States illegally." *Id.* (emphasis added).

The amended statute was considered by the Court of Appeals for the Second Circuit in *Lopez,* 521 F.2d at 437. In light of the amendment that court concluded that the statute was not limited to instances of harboring in connection with smuggling. *Id.* at 440-41. The court held that providing shelter, obtaining employment, providing transportation to and from work, and arranging sham marriages for illegal aliens was conduct tending to substantially facilitate the aliens' remaining in the United States illegally. *Id.* at 441. In a later decision, the Second Circuit announced the following test for determining what constitutes shielding, concealing, and harboring under 8 U.S.C. § 1324: "harboring, within the meaning of § 1324, encompasses conduct tending *substantially to facilitate* an alien's remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence." *United*

States v. Kim, 193 F.3d 567, 574 (2d Cir. 1999) (emphasis added); *see also United States v. Cantu,* 557 F.2d 1173, 1180 (5th Cir. 1977) (stating that proper test is whether charged conduct tended "substantially to facilitate an alien's remaining in the United States illegally") (quoting *Lopez,* 521 F.2d at 441).

Convictions under § 1324 generally involve defendants who provide illegal aliens with affirmative assistance, such as shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations. *See generally id.* at 1175-76, 1180; *United States v. Acosta de Evans,* 531 F.2d 428 (9th Cir. 1976); *Lopez,* 521 F.2d at 437. In contrast, we have found no cases in which a defendant has been convicted under this statute for merely giving an alien advice to lay low and to stay away from the address on file with the INS, obvious information that any fugitive would know.

For example, in *Kim,* the defendant Kim ordered his employee, an illegal alien, to report falsely to the INS that he had been terminated from his job, and Kim required the employee to obtain false documentation for the purpose of misleading the INS. *Kim,* 193 F.3d at 575. The court held that Kim's conduct met the definition of harboring under 8 U.S.C. § 1324 because it tended substantially to facilitate the alien's remaining in the United States illegally. *Id.* In effect, Kim directed his alien-employee to obtain false documentation as a condition of retaining his employment and gave detailed direction about how to affirmatively mislead the INS. The instruction was

specific and involved falsifying documents. Ozcelik's conduct here is not comparable. He merely passed along general information to Tuncer and made no suggestions regarding falsifying documents.

In another case illustrating the type of conduct that falls within the statute, *United States v. Sanchez,* 963 F.2d 152, 154-55 (8th Cir. 1992), the defendant Sanchez provided illegal aliens with apartments and immigration papers. The Court of Appeals agreed that this justified Sanchez's conviction for shielding, harboring, or concealing under § 1324. *Id.* at 155-56. In yet another decision, *United States v. Varkonyi,* 645 F.2d 453, 459 (5th Cir. 1981), the defendant forcibly interfered with INS agents to prevent the aliens' apprehension. In addition, the defendant provided both employment and lodging to the aliens and assisted at least one of them to escape from INS custody. *Id.*

It is true, as the government argues, that some activity short of providing shelter would violate the statute. In *United States v. Rubio-Gonzalez,* 674 F.2d 1067, 1069-70 (5th Cir. 1982), several INS agents undertook to investigate whether certain employees at a Texas work site were illegal aliens. Upon entering the work area, one agent stopped Rubio-Gonzalez and asked him for identification. The identification established that Rubio-Gonzalez was a legal resident. As the agents proceeded to look for other employees, Rubio-Gonzalez sped away on his motorcycle to another part of the work site. He then began speaking loudly and making gestures towards the INS

agents, telling two other individuals (later proven to be illegal aliens) that the immigration authorities were present. The two aliens then fled. *Id.* at 1070.

The Court of Appeals held that Rubio-Gonzalez's conduct in alerting the illegal aliens to flee from investigating INS officers constituted "shielding from detection" within the meaning of 8 U.S.C. § 1324.[7] *Id.* at 1072. The court reasoned that shielding does not imply "any requirement that a physical barrier of some kind be involved," nor does it imply that a trick or artifice be used. *Id.*

In *Rubio-Gonzalez,* there was an immediate threat to the illegal aliens, that is, the physical presence of the INS agents who intended to apprehend illegal aliens. Rubio-Gonzalez, who had knowledge of the imminence of the apprehension, actively sought out illegal aliens and alerted them. There was a close temporal proximity between the threat to the illegal aliens and the warnings the defendant undertook to spread. In addition, the defendant's conduct was an affirmative and active response to an impending threat.

In contrast, here there is no evidence that Ozcelik knew about any imminent threat to Tuncer's immigration status. Nor is there any evidence that

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[7] *Rubio-Gonzalez* involved interpretation of an older version of the statute but the relevant language was almost identical. *Compare* 674 F.2d at 1069 n.1 (quoting 8 U.S.C. § 1324(a)(3)), *with* 8 U.S.C. § 1324(a)(1)(A)(iii).

Ozcelik actively attempted to intervene in or delay an impending immigration investigation.

We agree with the Fifth Circuit that the terms "shielding," "harboring," and "concealing" under § 1324 encompass conduct "tending to substantially facilitate an alien's remaining in the United States illegally" and to prevent government authorities from detecting the alien's unlawful presence. *Id.* at 1073. We also agree that shielding does not require the use of a physical barrier, artifice, or trick. Nonetheless, we must examine whether Ozcelik's conduct fits within the statutory language as construed by the other courts of appeals.

The government cites the following evidence as proof that Ozcelik tended to substantially facilitate Ozcelik's remaining in the United States. During their March 24 meeting, Ozcelik stated to Tuncer, "You are not going to get involved in anything for 3-5 months in order to keep your status. Go to your work and come back home in silence, cook your food, do that only." App. at 988. Ozcelik continued, "The most important thing is for you to not get involved in anything here, to not get involved in any activity." App. at 989. In a similar vein, Ozcelik said to Tuncer, "That's why I'm telling you to stay away from everything for 4-5 months. Stay away from everything. Are you going to your job? Go, then come back home." App. at 992.

Ozcelik also commented that "it is a good thing that you've changed your address. I mean your legal

address is different. You are living with a friend here. Disappear, don't tell anyone what address you're staying at." App. at 992. Later, he said, "Stay away. Stay away from everything for 5-6 months. . . . Especially the address thing is very important." App. at 994. Ozcelik stated, "[A]s I said before stay low key for 5-6 months, because you do not have any rights." App. at 996. In a later recorded telephone conversation, Ozcelik said to Tuncer, "I told you, don't do anything, I mean don't go left and right a lot." App. at 999. This constitutes the totality of the evidence on which the government relies.

The government argues that because Ozcelik gave Tuncer many instructions, including telling Tuncer to hide, how to hide, and to use multiple addresses to avoid detection by the authorities, Ozcelik provided "counseling" that violates the statute. We disagree. Instead, we view Ozcelik's comments as general advice to, in effect, keep a low profile and not do anything illegal. Ozcelik suggested that Tuncer stay out of trouble. Telling an illegal alien to stay out of trouble does not tend substantially to facilitate the alien remaining in the country; rather, it simply states an obvious proposition that anyone would know or could easily ascertain from almost any source. Moreover, Tuncer had already changed his address before he even spoke to Ozcelik. Ozcelik's comments about that fact, therefore, were irrelevant because Tuncer had already taken the action on his own accord. Holding Ozcelik criminally responsible for passing along general information to

an illegal alien would effectively write the word "substantially" out of the test we have undertaken to apply. We decline to do so.

Considering the evidence in the light most favorable to the government we conclude that no reasonable juror could find that Ozcelik's conduct tended to substantially facilitate Tuncer's remaining in the United States illegally. We therefore reverse Ozcelik's conviction under 8 U.S.C. § 1324 (Count Two of the Indictment) and will remand for resentencing.

Because we reverse Ozcelik's conviction with respect to Count Two, the harboring charge, only one offense of conviction remains. Therefore, Ozcelik's contention that his two offenses of conviction should have been "grouped" for sentencing purposes is moot.

IV.

Conclusion

For the above-stated reasons, we will affirm the judgment of conviction in part and reverse in part. We will remand for resentencing.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Hon. Faith S. Hochberg
	:	Crim. No. 05-722 (FSH)
v.	:	**OPINION & ORDER**
HAKAN OZCELIK	:	Dated: September 7, 2006

HOCHBERG, District Judge:

This matter comes before the Court upon Defendant's Motion for Judgment of Acquittal pursuant to Fed. R. Crim. P. 29. Count I of the Indictment charged the Defendant Hakan Ozcelik ("the Defendant") with seeking and accepting a corrupt payment in violation of 18 U.S.C. § 201(b)(2). Count II of the Indictment charged the Defendant with attempting to shield an illegal alien from detection in violation of 18 U.S.C. § 1324(a)(1)(A)(iii). The trial began on March 14, 2006. On March 21, 2006, the jury returned guilty verdicts on both counts of the Indictment.

I. Fed. R. Crim. P. 29 Standard.

Since Defendant first moved for judgment of acquittal at the close of the Government's case, and the Court deferred ruling on the motion, the Court must first determine the Rule 29 motion based on a review of the Government's case only. Fed. R. Crim.P.29(b) ("If the Court reserves decision, it must

decide the motion on the basis of the evidence at the time the ruling was reserved."); *See United States v. Brodie,* 403 F.3d 123, 133-34 (3d Cir. 2005). Thereafter, the Court should rule on the acquittal motion on the totality of the evidence presented.

Fed. R.Crim. P.29(a) states, in pertinent part, that "[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." A defendant "challenging the sufficiency of the evidence bears a heavy burden." *United States v. Casper,* 956 F.2d 416, 421 (3d Cir. 1992). The Court "must view the evidence and the inferences logically deductible therefrom in the light most favorable to the government, to determine if there is sufficient evidence to support the factfinder's verdict." *United States v. McNeill,* 887 F.2d 448, 450 (3d Cir. 1989). "A verdict will be overruled only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Coleman,* 811 F.2d 804, 807 (3d Cir. 1987) (quoting *United States v. Campbell,* 702 F.2d 262, 264 (D.C. Cir. 1983); *United States v. Brodie,* 403 F.3d at 133 ("A finding of insufficiency should be confined to cases where the prosecution's failure is clear.") (citations and internal quotation marks omitted).

II. Discussion.

A. Evidence Presented in the Government's Case in Chief

1. Count I (Bribery)

The Government could prove the existence of a corrupt agreement: (1) from evidence that money or other valuables were solicited or received to benefit the government official directly or indirectly; (2) from evidence that an official favor was contemplated or that a government official agreed to violate his official duties; and (3) from behavior indicating consciousness of guilt. *See United States v. Friedman,* 854 F.2d 535, 554 (2d Cir. 1988); *see also United States v. Moeller,* 80 F.3d 1053, 1057-59 (5th Cir. 1996). In the present case, there was more than sufficient evidence of each of one of these factors.

First, there was ample evidence from the testimony of the Cooperating Witness, Tunc Tuncer, corroborated by a videotape of the Defendant, that U.S. Customs and Border Protection Officer Ozcelik solicited and accepted $2,300 in cash from Tuncer on March 24, 2005. On March 23, 2005, during a recorded telephone call, Defendant instructed Tuncer to bring $2,300 to the March 24th meeting. At trial, Tuncer testified that he complied with these instructions and turned the $2,300 in cash over to Ozcelik in Ozcelik's car, while Ozcelik was in uniform, at the New Port Mall parking lot in Jersey City, New Jersey, in the afternoon on March 24th. After he left the prearranged meeting with Ozcelik, Tuncer was searched

by a Customs agent and the funds that he had been given to tender to Ozcelik were no longer on his person. While Defendant contends that the evidence did not show that he obtained $2,300 from Tuncer, the jury was entitled to credit Tuncer's account, particularly in view of the corroborating evidence provided by the recordings.

There was also substantial evidence that Ozcelik contemplated passing on some or all of that $2,300 to other immigration officials in both Tuncer's testimony and by Ozcelik's statements on the tape recordings. The jury was entitled to credit the evidence from Tuncer and the tapes that Ozcelik was working with other immigration authorities and that he planned on passing money to them.

While Defendant contends that there was no evidence that Tuncer's immigration records were actually changed in the computer, nor was the identity proved of his "inside" contact, such proof is not necessary to establish sufficient evidence to sustain the conviction in Count I of the Indictment. There was sufficient evidence that Ozcelik himself would take, and that he was attempting to have other immigration employees take official action to assist Tuncer in resolving his illegal status with the federal immigration authorities. Tuncer testified that Ozcelik told him that he would get officials that he knew at the immigration office to assist in changing Tuncer's visa status so that he could remain in the country legally. This was corroborated at various points in the recordings where Ozcelik referred to his contacts

inside the immigration office. A reasonable juror could well construe from that evidence that Ozcelik, as a federal government officer, agreed to take official action to petition another in his branch of government, the Department of Homeland Security, for official assistance as a favor for Tuncer. A juror could reasonably conclude that Ozcelik told Tuncer, in sum and substance, that his contacts in the immigration section of Homeland Security would assist Tuncer from the inside, and that, if something went wrong with the plan to remedy Tuncer's visa problem, Ozcelik himself would "intervene." Thus, a reasonable jury could find that Ozcelik was acting to assist Tuncer by personally asking other federal immigration officials to take action to assist Tuncer. The Defendant participated directly by promising to access the correct insiders at the immigration section of the Homeland Security, and the Defendant promised to act as a middleman to get these insiders to fix Tuncer's visa status in exchange for money.

There was substantial evidence presented that Ozcelik was receiving money both for his own official action and to pass to other federal government actors for their official help. This evidence is sufficient to sustain a conviction for bribery in violation of Title 18, United States Code, Sections 201(b)(2) and 2 (the aiding and abetting statute). *See United States v. Dixon,* 658 F.2d 181, 191 (3d Cir. 1981) (middleman

who facilitated bribery of government official liable as aider and abettor).[1]

A reasonable juror could infer corrupt intent in soliciting the bribe. The evidence of Defendant Ozcelik's consciousness of wrongdoing was substantial. In a corrupt agreement, concealment to avoid detection is often essential. Ozcelik consistently instructed Tuncer to conceal the arrangement between Tuncer and himself, from which a reasonable juror could both infer a corrupt intent and reject the defense claim that all Ozcelik was doing was introducing Tuncer to a lawyer. The manner in which Ozcelik took the cash from Tuncer reflected concealing behavior. It also made the defense story about the lawyer ring hollow. It is one thing to give someone a lawyer's name and perhaps a prediction of the range of the fee that the lawyer will charge. But to demand cash inside a car in a parking lot in New Jersey could well be found by

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[1] There is also substantial evidence that Ozcelik endeavored to violate his own lawful duties as a Customs and Border Protection Officer by assisting Tuncer in remaining in the United States illegally. Enforcing the immigration laws of the United States, which includes identifying illegal aliens for further processing and proceedings, is part of the Defendant's duties. Ozcelik counseled and instructed Tuncer on how to avoid those laws and detection by the immigration authorities, including use of multiple addresses and concealing his location. Accordingly, the Government also presented sufficient evidence that Ozcelik attempted, and agreed, to violate his lawful duties in exchange for the $2,300 cash in violation of Title 18, Section 201(b)(2).

a reasonable judge as inconsistent with legitimate legal retention for advice in New York.

In sum, there was sufficient proof adduced showing Ozcelik's acceptance of $2,300 cash for his and other government officials' benefit; promises by Ozcelik of official action by himself and other immigration officials in contravention of official duties; and consciousness of wrongdoing, to demonstrate that Ozcelik committed bribery.

2. Count II (Attempting to Conceal and Shield and Illegal Alien from Detection)

Defendant Ozcelik also argues that there was insufficient evidence to sustain a verdict of attempting to shield and conceal an illegal alien from detection. The essential elements of this offense are: (1) that Tunc Tuncer was an alien in the United States in violation of the law; (2) that Defendant Ozcelik knew or was in reckless disregard of the fact that Tuncer was in the United States in violation of the law; and (3) that Defendant Ozcelik knowingly and wilfully attempted to conceal, harbor and shield from detection Mr. Tuncer in any place.

There was sufficient evidence indicating that Tuncer was an alien remaining in the United States in violation of the law. Tuncer testified that he had remained in the United States in violation of the terms of his student visa at least sometime in 2004. His testimony also established that immigration

authorities administratively arrested him on March 15, 2005.

There was substantial evidence showing that Ozcelik knew or was in reckless disregard of the fact that Tuncer was in the United States in violation of the law. Tuncer's testimony established that Ozcelik had learned that Tuncer had remained in the United States in violation of the terms of his student visa. Throughout the recorded conversations, Ozcelik's statements manifested his knowledge of Tuncer's status as an illegal alien. For instance, during the March 24, 2005 meeting, Ozcelik told Tuncer: "I mean, your situation is very difficult, it is really very difficult to be illegal, to do anything illegally in this country is very difficult, I understand that." Thus, a reasonable jury could conclude that Ozcelik was discussing Tuncer's status, and knew that Tuncer had remained in the United States in violation of the law.

Finally, the Government adduced sufficient evidence that Ozcelik attempted to conceal and shield Tuncer from detection. There was evidence from the recordings that Ozcelik gave Tuncer multiple instructions to conceal his activities in order to avoid detection from the immigration authorities. For example, Ozcelik told Tuncer at the March 24, 2005 meeting: "as I said before stay low key for 5-6 months, because you don't have any rights." Two months later, on May 24, 2005, Ozcelik repeated the same instruction and said: "I told you, don't do anything, I mean don't go left and right a lot." A reasonable jury could infer that Ozcelik had taken substantial steps toward

committing the crime of shielding and concealing an illegal alien by instructing Tuncer to hide from the immigration authorities.

B. Evidence at the Close of all the Evidence Presented

In the defense case, Ozcelik testified that he was attempting to work with a lawyer, Sol Kodsi, to petition the Immigration Service to change Tuncer's status. In his testimony, Ozcelik explained that the $2,300 was for Kodsi's fee. However, a reasonable jury was entitled to disbelieve some material aspects of Ozcelik's testimony and credit the Government's evidence instead. *See United States v. Friedman,* 998 F.2d 53, 57 (2d Cir. 1993) (holding that the jury was entitled to draw negative inferences from the defendant's testimony at trial). In particular, the jury was entitled to discredit Ozcelik's assertion that he was legitimately dealing with Kodsi to help Tuncer because the recordings revealed, among other things, that Ozcelik never mentioned Kodsi by name and never provided Tuncer with an address, phone number or any other contact information for Kodsi, and took the money in cash himself rather than sending Tuncer to a lawyer to pay the lawyer directly.

In addition, there was sufficient evidence to not credit Kodsi's testimony, in light of the Government's evidence adduced through both Kodsi's and Ozcelik's testimonies that Kodsi and Ozcelik were close friends.

III. Conclusion.

For the reasons stated above, the Court finds that there was sufficient evidence, both at the close of the Government's case in chief and at the close of all the evidence, supporting Defendant's convictions for the bribery offense charged in Count I of the Indictment and the offense of attempting to conceal and shield an illegal alien from detection charged in Count II of the Indictment.

Accordingly, **IT IS** on this 7th day of September, 2006

ORDERED that Defendant's Motion for Judgment of Acquittal is **DENIED**.

/s/ Faith S. Hochberg
Hon. Faith S. Hochberg,
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4245

UNITED STATES OF AMERICA

v.

HAKAN OZCELIK a/k/a Hakan Askin

Hakan Ozcelik,
Appellant

SUR PETITION FOR REHEARING

Before: SLOVITER, SMITH,
and STAPLETON, *Circuit Judges*

The petition for rehearing filed by Appellant Hakan Ozcelik in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: June 23, 2008
CRG/cc: Adrienne U. Wisenberg, Esq.
Solomon L. Wisenberg, Esq.
George S. Leone, Esq.
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(2)

Supreme Court, U.S.
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No. 08-365

In the Supreme Court of the United States

HAKAN OZCELIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for seeking and accepting a bribe in violation of 18 U.S.C. 201(b)(2), where petitioner, a Customs and Border Protection Officer, accepted $2300 from a confidential informant and indicated that, in exchange for that money, petitioner's contacts in the federal immigration agency would alter the informant's visa status in official computer records.

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In the Supreme Court of the United States

No. 08-365

HAKAN OZCELIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 527 F.3d 88. The opinion of the district court (Pet. App. 29-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2008. A petition for rehearing was denied on June 23, 2008 (Pet. App. 39). The petition for a writ of certiorari was filed on September 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of seeking and accepting a bribe in return for being influenced in the performance of official acts or for

being induced to do acts in violation of official duties, in violation of 18 U.S.C. 201(b)(2) and 2 (Count 1); and attempting to conceal, harbor, and shield an illegal alien, in violation of 8 U.S.C. 1324(a)(1)(A)(iii) (Count 2). Pet. App. 5-6, 29. The district court sentenced petitioner to concurrent terms of 27 months of imprisonment on each count. *Id.* at 7. The court of appeals affirmed petitioner's conviction on Count 1, but reversed his conviction on Count 2 for insufficient evidence and remanded for resentencing. *Id.* at 1-28. On remand, the district court resentenced petitioner to a term of 23 months of imprisonment on Count 1. Pet. 6.

1. a. Tunc Tuncer was a Turkish citizen who had been admitted into the United States on a student visa to attend Columbia University. Tuncer failed to meet academic standards at Columbia, and the school refused to readmit him. Tuncer therefore became subject to removal for being "out of status." Pet. App. 3; Gov't C.A. Br. 3

In October 2004, Tuncer's friend Uzgar Madik put Tuncer in contact with petitioner for help with his immigration issue. At the time, petitioner was a Customs and Border Protection Officer in the Department of Homeland Security (DHS). Pet. App. 3. Petitioner's primary duty was to inspect cargo on cruise vessels in Port Elizabeth, New Jersey, but petitioner also occasionally inspected the immigration documents of passengers at Newark International Airport. *Ibid.*; Gov't C.A. Br. 2-3.

After a short initial conversation, petitioner called Tuncer back to report that his case was "doable" or "easy" but that Tuncer would have to pay petitioner $2300. Gov't C.A. Br. 4; Pet. App. 3. Petitioner told Tuncer the money was for two of petitioner's friends in the Immigration and Naturalization Service (INS), who

would change the dates on Tuncer's visa in the official records system. *Id.* at 3-4. Petitioner told Tuncer he had "done this" for another person recently, and Tuncer told petitioner he would call when he obtained the money. *Id.* at 4. Petitioner called Tuncer several times over the next week or two to inquire about the money. Months then passed without Tuncer obtaining the money for petitioner. *Ibid.*; Gov't C.A. Br. 5.

b. In March 2005, an Immigration and Customs Enforcement (ICE) agent visited Tuncer at his apartment and advised him that he was "out of status." Pet. App. 4; Gov't C.A. Br. 5-6. The next day, the ICE agent administratively arrested Tuncer. *Ibid.* At that time, the agent and Tuncer discussed the possibility of Tuncer providing information to ICE about petitioner. *Ibid.*

Between March and May of 2005, Tuncer initiated several telephone conversations with petitioner at the direction of law enforcement, who recorded the conversations. Pet. App. 4; Gov't C.A. Br. 6-8. In the conversations, Tuncer informed petitioner that the immigration problem he previously had discussed was continuing, and petitioner reiterated to Tuncer that he could help but that Tuncer would have to pay at least $2000. *Ibid.* Petitioner subsequently amended the price to $2300, explaining that "[t]here is 2000 and than [sic] there is 300 for the fee, they will give those, they will do the thing for you, they will do the thing from the inside." Pet. App. 5 (brackets in original). Petitioner told Tuncer that his friends at INS would "deliver" a "one year extension of the I-20 [form]" to his home address and warned Tuncer that he should not tell anyone what was being done. Gov't C.A. Br. 8 (brackets in original). Petitioner did not tell Tuncer the name of his two contacts in

the INS, but he repeatedly stated that the money was for them. Pet. App. 5.

Petitioner and Tuncer arranged to meet at a shopping mall on March 24, 2005, so that Tuncer could pay petitioner the $2300 fee and provide him with copies of his immigration paperwork. Pet. App. 5. ICE agents gave the money to Tuncer and monitored the meeting with audio and video equipment. Gov't C.A. Br. 8-9. Petitioner arrived at the meeting wearing his official uniform and badge. *Id.* at 9. During the meeting, Tuncer inquired about whether petitioner's contacts were employees of INS. Petitioner responded that he could not "tell [Tuncer] that" and that Tuncer was "going too deep now." *Ibid.* Petitioner reassured Tuncer that something would be done "in the system," told Tuncer the process would take at least three months, and warned Tuncer again not to talk to others about the plan. *Id.* at 9-10. Petitioner directed Tuncer to get into petitioner's car and then instructed Tuncer to leave the money and his immigration documents in the space between the seats. Tuncer complied. *Id.* at 11.

Two months later, on May 24, 2005, petitioner and Tuncer had a final telephone conversation in which Tuncer asked if there was "anything new." Petitioner told Tuncer that he had made the necessary contacts and that Tuncer would be the one "receiving the news." Pet. App. 5; Gov't C.A. Br. 11-12.

c. Petitioner was arrested on September 13, 2005. In a post-arrest interview, petitioner denied that he was at the shopping mall on March 24, 2005, and denied meeting anyone at the mall to collect documents or money. Gov't C.A. Br. 12.

2. A grand jury in the District of New Jersey returned a two-count indictment charging petitioner

with seeking and accepting a bribe, in violation of 18 U.S.C. 201(b)(2) and 2, and attempting to conceal, harbor, and shield an illegal alien, in violation of 8 U.S.C. 1324(a)(1)(A)(iii). Pet. App. 5. The jury convicted petitioner of both counts, and the district court denied petitioner's motions for judgment of acquittal. *Id.* at 6, 29-38.

3. On appeal, petitioner challenged, *inter alia*, the sufficiency of the evidence supporting his convictions. The court of appeals reversed petitioner's conviction under 8 U.S.C. 1324(a)(1)(A)(iii) but affirmed petitioner's conviction under the bribery statute. Pet. App. 1-28.

a. The bribery statute, 18 U.S.C. 201, provides in pertinent part that it is a crime for

> a public official, directly or indirectly, [to] corruptly demand[], seek[], receive[], accept[], or agree[] to receive or accept anything of value personally or for any other person or entity, in return for:
>
> (A) being influenced in the performance of any official act;
>
> (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (C) being induced to do or omit to do any act in violation of the official duty of such official or person.

18 U.S.C. 201(b)(2).

b. As relevant here, the court of appeals found that there was "no question" that the evidence at trial satisfied the first two elements of the offense of bribery,

namely, that petitioner was a public official and that he received something of value. Pet. App. 9-10. The only "disputed issue," the court explained, was "whether the evidence [was] sufficient to prove that [petitioner] received Tuncer's money with a corrupt intent, that is, * * * for one of the three reasons prohibited by [the] statute." *Id.* at 10.

The court concluded that "the jury could find that [petitioner] asked other individuals within DHS to take official action on behalf of Tuncer," which was consistent with a "theory of aiding and abetting other unidentified Immigration officials to take official action to alter Tuncer's records." Pet. App. 11. The court also observed that the only "piece of evidence to show that such Immigration officials even existed" were petitioner's statements to Tuncer about his "friends" in the INS who would undertake to alter Tuncer's visa status. *Ibid.*

The court explained that in order to convict petitioner of bribery on an aiding-and-abetting theory, the government was required to prove that the "principals" (in this case, the two INS employees) committed all the elements of the charged offense. Pet. App. 12. For bribery, that showing required proof that the INS officials "agree[d] to accept the bribe in exchange for promising to carry out one of the statutory prohibitions (i.e., the promise to alter Tuncer's visa)." *Ibid.* The court concluded that the jury "could reasonably have concluded that [petitioner] had a contact (or contacts) at INS whom he aided in taking a bribe to violate the contact's official duty." *Id.* at 14. The court explained that the jury had evidence, in the form of petitioner's own statements to Tuncer, showing that petitioner's INS contacts had *agreed* to adjust Tuncer's visa status in exchange for the bribe money, "and it was at that point [(*i.e.*, the

moment of agreement)] that the crime of the principal was complete." *Ibid.*

The court of appeals acknowledged that it was "possible," as petitioner claimed on appeal, that petitioner "was lying" to Tuncer and that he had "no 'friend' at the INS" who was willing to adjust Tuncer's status. Pet. App. 15. But the court rejected the suggestion that such a possibility required reversal of petitioner's bribery conviction, because the credibility of petitioner's assertions was a matter for the jury to consider. *Ibid.* The court "[could not] say as a matter of law that no reasonable juror could accept the government's theory premised upon [petitioner's] own statements," and the court emphasized that it was "not permitted to assess credibility" in evaluating on appeal whether the evidence was sufficient to support petitioner's conviction. *Ibid.*

ARGUMENT

Petitioner asks the Court to grant review to address the question "whether a conviction premised on aiding and abetting can stand where there was no evidence—aside from the defendant's own statements—that any principal had committed a crime, or even existed." Pet. 7. Further review of that narrow issue is not warranted. The court of appeals did not err in finding that the evidence was sufficient to support petitioner's conviction for bribery, and the court's decision does not conflict with any decision of this Court or of another court of appeals.

1. Petitioner relies on *Wong Sun* v. *United States*, 371 U.S. 471 (1963), and *Opper* v. *United States*, 348 U.S. 84 (1954), as principal authorities for his position that petitioner's statements to Tuncer, even if credited by the jury as truthful, were insufficient as a matter of

law to establish that a crime was committed by the "principals" in this case, *i.e.*, the INS officials to whom petitioner claimed to have given the bribe money. *Wong Sun* and *Opper* state the "general rule that an accused may not be convicted on his own uncorroborated confession." *Smith* v. *United States*, 348 U.S. 147, 152 (1954); see *Wong Sun*, 371 U.S. at 488-489; *Opper*, 348 U.S. at 89-90. Petitioner acknowledges (Pet. 13) that *Wong Sun* and *Opper* did not involve aiding-and-abetting liability. Petitioner asks the Court to extend the reasoning of those cases to the aiding-and-abetting context.

As an initial matter, although petitioner challenged the sufficiency of the evidence supporting his bribery conviction in the court of appeals (Pet. C.A. Br. 29-31, 35-48) and included an argument that the evidence failed to establish aiding-and-abetting liability (*id.* at 41-45), petitioner did not rely upon *Wong Sun* and *Opper* in the appellate court. The court of appeals also did not address the distinct corroboration rule articulated in those cases. Pet. App. 8-19. Accordingly, petitioner's claim is not properly before this Court. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (The Court's "traditional rule" precludes a grant of a writ of certiorari when the question presented was not pressed or passed upon below.).

Petitioner's arguments also are without merit because they misperceive the scope of the corroboration rule articulated in *Wong Sun* and *Opper*. Unlike this case, *Wong Sun* and *Opper* both involved confessions or admissions of defendants that were made "after the fact"—that is, after the commission of the crime at issue. *Wong Sun*, 371 U.S. at 488-491; *Opper*, 348 U.S. at 88-89. As the Court explained in *Opper*, the rationale for requiring corroboration in the context of post-crime

confessions and admissions is that "the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession." *Id.* at 89-90.

Those concerns are not present in the context of statements made by an accused before a crime has occurred or, as in this case, when the crime is ongoing, the accused is not "under the strain of suspicion," and the statements of the accused are made in furtherance of the crime itself. See *Warszower* v. *United States*, 312 U.S. 342, 347 (1941) (admissions made "prior to the crime" do not require corroboration because they "contain none of the inherent weaknesses of confessions or admissions after the fact"); *Ogden* v. *United States*, 303 F.2d 724, 742 (9th Cir. 1962) (rule requiring corroboration of a defendant's admissions "applies only to admissions made after the commission of the offense"), cert. denied, 376 U.S. 973 (1964). The courts of appeals have recognized this limitation on the corroboration rule. See, *e.g.*, *United States* v. *Simmons*, 923 F.2d 934, 954 (2d Cir.) (noting the "critical distinction" between statements made to law enforcement officers after commission of a crime and statements made between co-conspirators in furtherance of a conspiracy), cert. denied, 500 U.S. 919, and 502 U.S. 943 (1991); *United States* v. *Waldemer*, 50 F.3d 1379, 1388 (7th Cir.) ("Statements that a defendant made before or during the commission of the crime do not have to be corroborated to convict the defendant."), cert. denied, 515 U.S. 1151 (1995). Accordingly, the court of appeals did not err in concluding that the credibility of petitioner's assertions to Tuncer was a matter for the jury to resolve and that, if credited, those asser-

tions supported a jury finding that petitioner's INS "friends" had committed the offense of bribery.

2. Further review also is unwarranted because, even assuming a "corroboration rule" applied to petitioner's out-of-court statements to Tuncer, the record contained adequate corroborating evidence of the crime. In *Opper*, the Court explained that "[i]t is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." 348 U.S. at 93. The corroborating evidence "does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that [the] defendant is guilty." *Smith*, 348 U.S. at 156.

In this case, petitioner's assertions to Tuncer about the illicit conduct of his contacts in the INS were corroborated, first, by the direct evidence that petitioner accepted Tuncer's $2300 bribe payment. The manner in which petitioner accepted the money— secretly, in his car, by directing Tuncer to leave it between the seats— strengthened the corroboration by exhibiting petitioner's consciousness of his own guilt. Similarly, petitioner's repeated instructions to Tuncer to conceal their arrangement provided additional corroboration that the bribery offense was actually occurring as petitioner said it was. And petitioner's post-arrest false exculpatory statements—denying that he was ever at the shopping mall to engage in an exchange with Tuncer when his presence there was indisputable—provided further corroboration for the bribery offense.

3. This case also would be a poor vehicle in which to address the issue petitioner presents. Although the court of appeals concluded that only an aiding-and-abet-

ting theory could support petitioner's conviction for bribery, that is not correct. See Pet. App. 11 (noting that both theories of petitioner's guilt articulated by the government "blend[ed] together into one theory of aiding and abetting" immigration officials to take official action on Tuncer's records). As the government argued, Gov't C.A. Br. 39-41, petitioner violated the bribery statute by accepting Tuncer's money in return for being induced to act in violation of his *own* official duty under 18 U.S.C. 201(b)(2)(C). Petitioner violated his official duty as a DHS officer when he agreed to facilitate Tuncer's efforts to alter his immigration status through illicit means. Because petitioner accepted cash as an inducement to engage in that violation of duty, he committed bribery, and his liability did not depend on aiding-and-abetting principles.

Moreover, petitioner's liability on a "violation of [ ] official duty" theory, see 18 U.S.C. 201(b)(2)(C), does not require the existence of "real" INS agents who were capable of fulfilling the promises petitioner made to Tuncer. The bribery statute does not require that the public official genuinely intend to commit the violation of his official duty when he corruptly seeks or receives something of value; rather, it is sufficient if the public official corruptly receives the payment knowing that it is being given for the purpose of inducing him to violate his duty. See *United States* v. *Valle*, 538 F.3d 341, 344-347 (5th Cir. 2008), petition for cert. pending, No. 08-7441 (filed Nov. 24, 2008). In other words, it is no defense to Section 201(b)(2) liability that the public official fraudulently promised the bribe-giver that he would violate his duty. As the Second Circuit has explained, "[i]f [the defendant] was 'playacting' and giving false promises of assistance to people he believed were offer-

ing him money to influence his official actions, he violated [Section 201(b)(2)]." *United States* v. *Myers*, 692 F.2d 823, 842 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983); see also *United States* v. *Ford*, 435 F.3d 204, 213 n.6 (2d Cir. 2006). Accordingly, petitioner's receipt of Tuncer's payment in return for his corrupt promise to have others illicitly adjust Tuncer's visa status violated Section 201(b)(2), even if petitioner's purported contacts in the INS did not exist. Petitioner was a "public official;" he sought and received money; the payment was made to induce him to violate his official duty; and he accepted Tuncer's money with corrupt intent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-365

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In The

Supreme Court of the United States

HAKAN OZCELIK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY OF PETITIONER TO BRIEF OF UNITED STATES IN OPPOSITION

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ARGUMENT

Contrary to the Government's position, the question raised in this Petition warrants further review, not only because it asks the Court to extend the principle that a defendant's uncorroborated statements are not legally sufficient to prove that a crime was committed to situations in which the defendant is charged under an aiding and abetting theory, but also because it provides the Court an opportunity to recognize formally that that rule extends beyond the narrow category of after-the-fact confessions to a broad category of extrajudicial statements, including those at issue here.

1. The Government points out that the factual circumstances of *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Opper v. United States*, 348 U.S. 84 (1954), related to post-conduct admissions and confessions, and suggests that the concerns present in such scenarios – that "the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession" – are not present in this case. (Gov. Brf. at 8-9) But whatever the particulars of *Wong Sun* and *Opper*, the principles derived from those cases and their progeny have had greater applicability than just to after-the-fact confessions.

Courts have interpreted *Wong Sun* to apply to a variety of "uncorroborated extrajudicial statements" made before, during, or after the actual offense conduct. Notably, federal courts of appeals have applied *Wong Sun* in situations analogous to that here, in which the statements were made to undercover law enforcement during the pendency of the conduct at issue. *See United States v. Wolfenberger*, 696 F.2d 750, 751, 753 (10th Cir. 1982) (noting defendant's "conviction under section 922(h)(1) was based solely on an uncorroborated extrajudicial statement he had made to undercover agents," and *citing Wong Sun* for principle that "[a] defendant cannot be convicted of a crime solely on the basis of an uncorroborated extrajudicial statement"); *United States v. Shunk*, 881 F.2d 917, 918 (10th Cir. 1989) (under similar circumstances, "[t]here is no question that the defendant's statements to the [undercover] officer regarding ownership of the pistol should be characterized as admissions by a party opponent within the definition set forth in Fed. R. Evid. 801(d)(2)(A)[, which] admissions formed the principal basis upon which the defendant's conviction rests"); *see also United States v. Curtis*, 324 F.3d 501, 504, 507 (7th Cir. 2003) (extrajudicial statements came via testimony of co-conspirators, who recounted statements made by defendant before, during, and after charged murders, and court noted defendants were "correct that an uncorroborated party admission is insufficient to support a criminal conviction," *citing Wong Sun*); *United States v. Fearn*, 589 F.2d 1316, 1322 (7th Cir. 1978) (in prosecution for making a false

material fact in a loan application, holding that admissions made by defendant to landlord shortly after having sought loan were "not sufficient to sustain the conviction unless there is sufficient corroboration in the other evidence adduced at trial").

2. Among the cases cited by the Government is *Warszower v. United States*, 312 U.S. 342 (1941), in which the Court concluded that statements made prior to the commission of an offense do not require the same corroboration as confessions or admissions after the fact. *Warszower* was decided well before *Opper*, however, and nearly two decades before *Wong Sun*, both of which, it is respectfully submitted, have broader application than the narrow conclusion reached in *Warszower*, as indicated by the more expansive interpretations in the cases cited above. To the extent that the Government cites intermediate appellate court cases concluding that statements made during the course of a defendant's criminal conduct – including statements made to a defendant's criminal accomplices – do not need additional corroboration, (*see* Gov. Brf. at 9, *citing Ogden v. United States*, 303 F.2d 724, 742 (9th Cir. 1962); *United States v. Simmons*, 923 F.2d 934, 954 (2d Cir. 1991); *United States v. Waldemer*, 50 F.3d 1379, 1388 (7th Cir. 1995)), the conflict between those cases and the cases cited above in which the opposite conclusion was reached is, of course, a reason why certiorari should be granted, in order to resolve any tension in the interpretation of *Opper* and *Wong Sun*.

3. The Government further relies upon the Court's traditional rule precluding grant of certiorari with respect to questions not pressed or passed upon below. (Gov. Brf. at 8, *citing United States v. Williams*, 504 U.S. 36, 41 (1992).) That rule poses no obstacle to review here, however, since the sufficiency of the evidence was squarely before the court of appeals, and the court itself expressly reached the conclusion that, although the only evidence that a crime was committed by another was the defendant's own statements, those statements by themselves were legally sufficient to prove Petitioner's guilt under an aiding and abetting theory. (App. 15 ("we cannot say as a matter of law that no reasonable juror could accept the government's theory premised on Ozcelik's own statements.")) For that reason, it was the court of appeals' holding that raised the question of whether such evidence can be sufficient as a matter of law, a question regarding which *Wong Sun* and *Opper* provide guidance. In any event, Petitioner does not rely on those cases as directly controlling authority, but urges that the same principles underlying them apply to an equal, and arguably greater, extent when a defendant's uncorroborated statements provide the sole evidence that a crime was committed by another individual.

4. The remaining arguments raised by the Government are not germane to the question of whether certiorari should be granted on the specific question presented here. Whether or not there was

adequate evidence corroborating Petitioner's statements, as the Government contends (Gov. Brf. at 10), would only become an issue after the threshold question – namely, whether such corroboration is legally required – had been answered by the Court. Likewise, the Government's additional arguments taking issue with aspects of the court of appeals' decision do not support the assertion that "[t]his case also would be a poor vehicle in which to address the issue petitioner presents." (Gov. Brf. at 10-11) To the contrary, the court of appeals' holding framed the issue in a pure and straightforward manner, recognizing that the evidence purporting to demonstrate that a crime was committed by another was limited strictly to the defendant's statements, and concluding that such evidence was legally sufficient in itself. Whether this determination was correct is the important question before the Court, and the Court should use this opportunity to make it clear, as a matter of law, that more is required than the uncorroborated extrajudicial statements of the defendant to prove that a crime was committed by another when a prosecution is based on a theory that the defendant aided and abetted another.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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